United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1138

To Be Argued By
Thomas N. Rinaldo, Esq.
Estimated Time for Argument
(15 minutes)

B
P/S

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent

vs

HERBERT DAVIS GORDON,

76-1138

Defendant-Appellant

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

On March 15, 1976, Herbert Davis Gordon was condemned to prison life 18 years upon his conviction by a jury for bank robbery, in violation of Sections 2113 (a), (b) and (d) of Title 18 U.S.C.

During the course of his arrest or October 6, 1975, the defendant was subjected to searches and seizures in violation of his guaranteed Fourth Amendment rights. The items secured as a result of these unlawful and unconstitutional searches were admitted into evidence at his trial and clearly contributed to his being convicted as aforesaid.

Also, the Trial Court in its imposition of an 18 year prison term upon the defendant based its sentence upon an improper foundation. The Court let the sentence fit the crime and not the individual and thus abused its discretion.

STATEMENT OF FACTS

On October 3, 1975, the Homestead Savings and Loan Association, a bank in Buffalo, was robbed by a lone gunman.

Bank cameras took pictures of this individual and the local F.B.I. had same reproduced. These reproductions were shown to two (2) bank tellers and several other individuals, by agents of the F.B.I.

The Buffalo F.B.I. was able to determine from its investigation that one HERBERT DAVIS GORDON apparently robbed the bank, and they were also able to determine that his present whereabouts was at a Y.M.C.A. in Dallas, Texas.

The Buffalo F.B.I. got an arrest warrant and informed the Dallas F.B.I. as to the status of this investigation, and further that one HERBERT DAVIS GORDON was wanted for a bank robbery that occurred in Buffalo on October 3, 1976.

On October 6, 1975, based on this information, H. Lamar Meyer, a special agent of the F.B.I. stationed in Dallas, Texas, went to the Dallas Y.M.C.A. to apprehend one HERBERT DAVIS GORDON who, upon information received by his office, was supposedly residing there.

The Buffalo office had information indicating that Mr. Gordon travelled to Dallas and might be staying at the Y.M.C.A. there. The information from Buffalo indicated that an arrest warrant had been issued for Mr. Gordon and a photographic facsimile taken by a bank surveillance camera was forwarded to the Dallas office.

Agent Haynes, in the company of two other agents, Dodson and Lowell (H.R. 60)[1] arrived at the Y.M.C.A. just after three o'clock on October 6, 1975 (H.R.38). Agent Lowell was left to set in the lobby to watch people come and go from the elevators in the building (H.R.39, 62). Agents Haynes and Meyer went to see the resident manager of the Y.M.C.A. building to ask if he had a man named Gordon residing there, and if so, in what room. The resident manager indicated a Herbert D.

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1 H.R. refers to Suppression Hearing Transcript commencing at Page iv of the Appendix.

Gordon was registered in room 721 (H.R. 39). The agents went back out to the lobby and talked with Agent Lowell who said that he had seen a man resembling Gordon take the elevator up (H.R. 39). Agent Lowell was again left in the lobby as Agents Haynes and Meyer took the elevator up to the seventh floor, went to room 721 and knocked at the door (H.R. 39, 40).

The door was opened and Agent Meyer recognized the person opening it as the same person pictured in the facsimile sent from Buffalo (H.R.40). Agent Haynes pushed on the door and Mr. Gordon went with it and at least lost his balance, if he in fact did not fall down (H.R. 63). The agents identified themselves and placed Mr. Gordon immediately under arrest (H.R. 63). As the door was shut behind them, Agents Haynes and Meyer had the defendant cornered in order to control his movements (H.R. 64) and his face was to the door and his back to the room (H.R. 65). Mr. Gordon turned around once as Agent Haynes frisked him and then he was handcuffed, his hands in front of his body (H.R. 65-66).

Room 721 was a small room, about seven feet wide and ten and a half feet deep, crowded with furniture, and with a closed-off closet on one side (H.R. 42,79). Mr. Gordon had been turned around to face the room when the handcuffs were applied and had his back to the door with Agent Haynes standing next to him holding him under the arm and Agent Meyer standing in front of him blocking his access to the rest of the room (H.R. 66, 69, 70). Agent Meyer was facing Mr. Gordon (H.R. 71). Agent Meyer felt at this point that he had the defendant physically under control but still had some concern over the possibility of weapons (R. 67-68).

Agent Meyer asked Gordon if there were any weapons present in the room (H.R. 69). Mr. Gordon either nodded his head in the direction of the bed (H.R. 69) or told Agent Meyer "There on the bed" (H.R. 70). Agent Meyer turned around and saw a jacket on the bed and discovered a handgun there also (H.R. 71).[2] He picked up

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[2] The Trial Court was left unsatisifed from the testimony given at the hearing as to whether the jacket lying on the bed was covering the gun. The Court therefore assumed that the gun was at least partially covered by the jacket and impliedly ruled out its admissibility under "plain view" grounds. The gun was held admissible as having been found during a proper search conducted incident to arrest.

the gun, which was in a holster (R. 71), and placed it on a dresser-top (H.R. 80). He then asked Mr. Gordon if there were any other guns in the room (H.R. 72).

Mr. Gordon said that there was another gun in the closet, in the bag that was there (H.R. 73). It was a white [illegible], zipper bag (H.R. 46). Agent Meyer went to the closet and pulled out the bag and found an automatic pistol in a holster (H.R. 46). At the same time, he noticed some bills and change in the bag (H.R. 47). He took the gun, emptied it and placed it on the dresser-top with the first gun (H.R. 80).

Mr. Gordon, who had been held near the door by Agent Haynes while Agent Meyer was taking possession of these weapons, was now taken over to the bed and set down. Agent Meyer was sitting next to him.

Now, finally, he was read his rights (Miranda warnings) and shown a printed copy of those rights. He

was asked to sign a waiver of those rights but he refused, (but did agree to answer questions of his own choosing). When asked, "Did you rob the bank?", the defendant refused to answer, and said that he had better not answer any questions without an attorney. He also refused to answer one or two more questions of the same nature (H.R. 73-75).

Agent Meyer then explained to the defendant that it was the agents' normal procedure to search the room, and that if Mr. Gordon had no objection, the agents would now search his room. He was shown a consent form with the explanation that it had to do with informing him that he had a right to refuse the search. Mr. Gordon looked at the form and signed it (H.R. 75). At this time, Mr. Gordon was seated on the bed with Agent Meyer next to him and Agent Haynes standing next to the defendant (H.R. 77).

Having obtained the signature of the defendant on the consent form, Agent Meyer searched the room. Mr. Meyer first went to the closet and retrieved the white vinyl bag from which he had earlier removed the automatic pistol. He took it over to the dresser top where

the two guns were lying and emptied the bag. He found a note, ammunition for both guns, Amtrak tickets and some bills and change. In addition to this, some currency and change had been removed from Mr. Gordon's pockets after he had been given his rights but before the search consent was signed (H.R. 80-82).

The ride to the Dallas County Jail took about five minutes and during that time the defendant was shown the facsimile of the picture taken by the bank surveillance camera and Mr. Gordon related to Agent Meyer that he recognized himself (H.R. 84). Despite no further warnings to the defendant of his constitutional rights, the defendant was interrogated by Agent Meyer with regard to the bank robbery in Buffalo (H.R. 85-86).

A Suppression Hearing was held and it was decided at the trial the gun found lying on the bed was ruled as admissible by the Court as having been within the possible control of the defendant and justifiably seized on the grounds of "putting down danger" (Decision p. 6). The second gun, which had been found in the closet, was suppressed because it "did not present that danger" (that the first gun had), (Decision p. 6-7).

The bag from which the second gun had been seized, and the remainder of its contents, were ruled admissible items as properly seized under the consent search (Decision p. 7).

Conviction and Sentence

Mr. Gordon was convicted as charged after a jury trial on February 3, 1976. On March 15, 1976, Herbert Davis Gordon was sentenced by the Honorable John T. Elfvin, United States District Judge for the Western District of New York to a prison term of eighteen years.. Mr. Gordon is presently incarcerated. This appeal is from that judgment of conviction.

POINT I

THE SEIZURE OF THE FIRST HANDGUN FROM THE BED IN THE DEFENDANT'S APARTMENT WAS ILLEGAL AND IN VIOLATION OF THE DEFENDANT'S FOURTH AMENDMENT RIGHTS AND SHOULD HAVE BEEN SUPPRESSED BY THE TRIAL COURT. THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

In Chimel v. California, 395 U.S. 752-89-S. Ct.- 2034; 23 L. Ed. 25 685 (1969), the Supreme Court attacked broadside the question of the allowable breadth, under the Fourth Amendment, of a search conducted incident to a lawful arrest. The opinion of Justice Stewart, after discussing at length the history and import of the problem, arrived at a surprisingly apothegmatic definition of those parameters which have found surreptitious citation in the years since it was written. The opinion defined the permissive area as being:

> "(T)he arrestee's person and the area 'within his immediate control' - - construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence." Chimel supra, at P. 763.

The justification for such a search was stated in an equally concise manner:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use to resist arrest or effect his escape. Otherwise, the officer's salary might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun or a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." Chimel, supra, at P. 762.

The assertiveness of the statement has ensured a strict adherence to its circumscriptions among the Supreme Courts subalterns--both Federal and State--albeit the former having felt the suasion to a greater degree, generally, than the latter. This is not to deny, however, that there exists a grey area between clearly reasonable and clearly unreasonable searches under the Chimel rule where its precision is not determinative, and where judicial determination becomes a necessary supplement. It is into this area that the present case falls.

In the course of such determination, however, several elements have emerged as common to all cases and have been developed into informal guidelines to help the courts in the determination of these grey area cases. We shall set out those major factors and show how, in their application to the instant case, the search and seizure made incident to the arrest of the defendant, the fruit of which search and seizure was the gun lying on defendant's bed, was unreasonable and therefore violative of the commandment of the Fourth Amendment. And that, therefore, the gun found lying on the bed should have been suppressed by the Court below as the fruit of such an unlawful search under the "exclusionary rule."

The first factor to be considered is really the question begged by Chimel, namely, whether the defendant is believed to be armed. This consideration actually includes several ancillary factors such as the cause for his arrest (i.e. was it a violent crime? . . . Murder, rape, etc.), the recentness of the crime (are the police in hot pursuit?) and the general known or suspected demeanor of the arrestee (do his past actions indicate that he will resist with

deadly force when apprehended?).

In the present case, we may first go immediately to the question of the apprehension, or lack thereof as the actual situation will reveal, on the part of the F.B.I. agents involved here, as it relates to the question of the seizure of the first handgun.

Agent Meyer stated unequivocally that he "was worried about the possibility of weapons" (H.R. 67-78). However, if we examine the reasons for his expressed worry, and take these together with an examination of his actions, we have to wonder whether he was, in fact, worried at all.

Agent Meyer had been informed of the fact that the defendant "might be armed" (H.R. 37). No other warnings appear such as "caution should be used in his apprehension because the person is dangerous," or so forth.

Also, the actions of the agents themselves demonstrate that they were not overly concerned about this fact. Particularly indicative is that neither of the

agents drew his gun before entering the defendant's room (H.R. 91). Their actual style of entry would not seem to be that of police officers about to confront an armed and dangerous felon. Instead of brandishing their own weapons and protecting themselves by pushing the door open and remaining to the side of the door jam until they had spotted their arrestee and made certain that he posed no danger to them, the agents simply knocked on the door as any caller would do and walked in when it was opened to them (H.R. 40-41). These would hardly seem the actions of seasoned police officers reacting to a potentially dangerous apprehension situation. In addition, the agents, originally three in number, had no qualms about reducing their number to a mere two (H.R. 39) before proceeding to the defendant's room. They seemed quite unconcerned about any threat to their own safety.

In U.S. v. Williams, 454 F. 2d 1016 (D.C. Cir. 1971) a gun taken from under a mattress in the arrestee's room was held to be within the defendant's "immediate control or possession" because:

1) There were two persons being placed under arrest in the room (another factor for consideration which we shall discuss more fully below), and

2) The persons being arrested had just used the gun in the robbery of a parking lot attendant some minutes prior to the arrest.

The heat of the chase of armed robbers add breadth to the permissible scope of a search incident to an arrest. The Court in Williams, supra, allowed great latitude for that reason -- there was an extreme aura of dangerousness involved which is singularly lacking in the case of Mr. Gordon's arrest.

Mr. Gordon was wanted with regard to a crime committed 2,000 miles away several days before and had been able to afford himself the luxury of a train ride over that distance in the interim.

This can hardly be compared to Williams, supra, situation where two men are arrested minutes after committing an armed robbery, in which there was an assault on the victim, just a few blocks away and who

were most probably in an excited state having been chased immediately and continuously by the police from the moment of the commission of the crime to the moment of arrest, and who, in that excited state, might very well make an attempt to escape the custody of their captors by using force against them. All these elements of danger are absent in the situation of defendant's arrest here, and their absence is reflected in the almost nonchalant manner with which the agents effected this arrest.

As mentioned above, another important factor for consideration when determining the reasonableness of a search made incident to an arrest is the presence of third parties in the room. The difficulties encountered in controlling an arrestee becomes manifold when others sympathetic to him are present at the time of his arrest. The area of control becomes much wider when there is the potentiality for concerted effort and justifies a broader search to secure weapons or easily destructible evidentiary items.

In U.S. v. Manarite, 448 F2d 583 (2d Cir. 1971) the presence of other persons in the room where the

arrest was being made, who could easily destroy the evidence lying about the room (obscene films and literature), and the fact that a gun had already been found in a bag only six inches from where the defendant was standing, presented sufficient cause to allow a search of much broader scope -- to protect from the exercise of dominion by the third parties over weapons or destructible evidence within their immediate control or possession (emphasis supplied).

The simple fact in the present case is that no other persons were present to raise the degree of potential danger to either the agents' security or the preservation of any evidence present in the room. This factor's absence places a much heavier demand on the other factors under consideration in order to justify the seizure.

The ability of the arrestee to gain access to the item seized is another element which has been used to help in determining the reasonableness of a search.

In U.S. v. Shye, 473 F. 2d 1061 (6th Cir. 1973) the District Court's determination that items seized as a result of a search behind a water heater only four feet from

the arrestee were not within the scope of a search incident to an arrest under the rule of Chimel, supra, was upheld. The arrestee was against a wall, within the physical control of the police, and a policeman was standing between the arrestee and the objects seized, impeding, thereby, the arrestee's ability to get to those objects.

Many similarities to the situation in Shye, supra, are present in the instant situation. Mr. Gordon was being held near the door leading out of his room by one agent i.e. he was "physically" controlled to the satisfaction of Agent Meyer who felt secure enough to begin going about the room (H.R. 70) while the other agent stood directly between Mr. Gordon and the bed upon which the gun was located (H.R.69). There are enough similarities, in fact, that we might suggest that Shye is controlling and is sufficient basis for a ruling that the search was unreasonable. We shall, however, use it only insofar as it demonstrates the presence of another element in the overall consideration which points to the fact that the search and seizure of the first handgun here was unreasonable.

Closely related to this question of accessibility is that of the physical control exercised by the police over the arrestee. As a first consideration we might look to the actions of the defendant as indicative of what measures were necessary to contain him.

In U.S. v. Mulligan, 488 F. 2d 732 (6th Cir. 1973), the defendant was seated two and one half to three and one half feet from an open closet. Without the permission of the arresting officers, he twice moved from his chair toward the closet. The Court held that the suspicion of danger which had been aroused in the officers by the arrestee's actions was a sufficient reason for extending the scope of the search for weapons into the closet, and that stolen money found as a result of that search was admissible into evidence.

No such indications of unwillingness to comply with the slightest demands of the agents were given by the defendant in the present case during the course of his arrest. His only movements were pursuant to the requests of the agents and that they realized this is shown by Agent Meyer's testimony.

The agents used no force during the course of the defendant's arrest and rightfully so, for Mr. Gordon's comportment was exemplary of what surely every police officer would like to find whenever he has occasion to make an arrest. The defendant's docile move to answer the knock at his door was the last one he made which was not dictated by the agents here until he was left at the Dallas County Jail.

Looking at the actual details of the arrest here to determine the control exercised by Agents Haynes and Meyer, we may start with the fact that Agent Meyer felt that he had the defendant "physically" controlled before he began his search for the weapon (H.R. 67). The defendant had been "cornered" (H.R. 64) by the two agents within seconds of their entry into his room. But, more importantly, the defendant was immediately handcuffed by Agent Haynes (H.R. 66). Additionally, Agent Haynes was holding him under the arm to thwart any possible furtive movements by the defendant to try to escape or seek a weapon (H.R. 70).

In U.S. v. Baca, 417 E. 2d 103 (10th Cir. 1969) the defendant was handcuffed immediately upon the entry of the police into his home. The Court found this decisive in determining the permissible breadth of the search incident to his arrest. It stated:

> "it cannot be said that the inside of his bureau drawers, night stand, under the bed or any similar area was under any type of control by Baca inasmuch as he was handcuffed with his hands behind his back and was unable to even dress himself." U.S. v. Baca, supra at p. 105.

The same Court reiterated the importance it had placed on the presence of handcuffs on the defendant in

Baca as a controlling factor in determining an arrestee's continued ability to "grab".

In U.S. v. Patterson, 447 F.2d 424 (10th Cir. 1971), an envelope was seized from a kitchen counter and the evidence which it contained was allowed to remain in evidence because the defendant was in the kitchen at the time of seizure. The Court paid little attention to the fact that five officers were in the kitchen with her but looked instead to Baca for guidance, and more specifically, to its heavy emphasis on the defendant being handcuffed there.

In Patterson, supra, such factors were present at the arrest:

> "as the presence of five officers, the arrest itself (thereby implying restraint and loss of control of the surrounding area), and the physical presence of the police detective between Mrs. Patterson and the cabinet. While these are restraints of sorts, we are not willing to hold these restraints to be as effective as the handcuffing in Baca to render the immediately surrounding area beyond the arrestee's control. U.S. v. Patterson, supra, at p. 427." (emphasis supplied)

In Mulligan, supra, the Court took the time to remark in its statement of the facts that the arrestee was not handcuffed at the time certain items were seized, and graces this mention with a footnote that refers to Baca, supra.

The rather blatant implication is, of course, that the presence of handcuffs in this case would very likely have altered the Court's determination that the search conducted there was a reasonable one.

In the present case, the handcuffs were placed on the defendant immediately and represent an important factor in demonstrating the complete control the police exercised over the defendant. Even had he been able to break free from the grasp of Agent Haynes and gotten past Agent Meyer to the bed where lay the gun, the possibility that he could free the gun from its holster and use it with his previously fettered hands before the agents were able to regain control over the situation would seem, at the very least, remote.

One must again consider the frame of mind of the agents, men long experienced in the art of apprehanding criminals, who placed the manacles on the defendant's wrists with his hands in front of his body. Had they truly harbored any doubts at the time of this arrest that the defendant posed the slightest danger to them, either in will or in capacity, they would have shackled his hands behind him. Apparently, neither experience nor good sense required this in the instant situation.

Having reviewed the facts surrounding the defendant's arrest and in light of the guidelines developed on a case-by-case basis to ease the difficulty of determining the reasonableness of a search conducted incident to a lawful arrest which does not fall clearly within the rule set forth in Chimel, it is the respectful contention of appellant that the search here was an unreasonable one in violation of the Fourth Amendment's protections.

The Court below erred, therefore, in refusing to suppress from entry into evidence the gun discovered as a result of this unreasonable search on the bed in defendant's room at the Y.M.C.A. in Dallas, Texas.

POINT II

THE SEARCH OF THE DEFENDANT'S ROOM AND THE ITEMS SEIZED FROM THE CLOSET IN THE DEFENDANT'S ROOM WERE A RESULT OF THE DEFENDANT'S SUBMISSION TO THE GOVERNMENT AGENT'S AUTHORITY AND THE DEFENDANT'S EXECUTION OF THE CONSENT TO SEARCH FORM DID NOT CONSTITUTE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF THE DEFENDANT'S FOURTH AMENDMENT RIGHTS. THE TRIAL COURT SHOULD HAVE SUPPRESSED THESE ITEMS AND, ACCORDINGLY, A NEW TRIAL SHOULD BE ORDERED.

A warrantless search conducted pursuant to a valid consent is constitutionally permissible. This is an exception to the Fourth Amendment rule that searches conducted without a proper warrant issued upon probable cause are "per se unreasonable ..." A search conducted pursuant to a valid consent is a constitutionally permissible and a wholly legitimate aspect of effective police activity, but the Fourth and Fourteenth Amendments do place some requirements on consensual searches in that the consent must be voluntarily given. The consent must not be "coerced, by explicit or implicit means, by implied threat or covert force." In the area of consent searches the "traditional definition of 'voluntariness'" is to be applied. "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's right to refuse is a factor to be taken into account, the prosecution is not

required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.ed. 2d 854 (1973).

In the instant case, the defendant, after he was arrested and given his rights by the agents, was asked to consent to a search of his room. The defendant and Agent Meyer executed a "consent form" to that effect. Agent Meyer then conducted a search of the defendant's room. During the course of the search, a white vinyl bag containing ammunition, currency, coins, underwear, a note, Amtrak tickets and betting stubs, was seized (H.R. 49-56). The bag and its contents were admitted into evidence by the Court below as items legally seized under the consent search. Decision (p. 7).

It is the contention of the appellant that the Court below erred in admitting these items into evidence. The consent under which the search was conducted was not a voluntary consent arising from defendant's "essentially free and unconstrained choice:" it was rather the product of explicit and implicit coercion from the agents.

A prior unlawful search does not render evidence obtained by a subsequent search inadmissible. U.S. v. Willis, 473 F.2d 450 (6th Cir. 1973) at 452. But the use

of unlawfully obtained information in procuring consent is a relevant factor to consider in determining the voluntary nature of the consent. U.S. v. Hearn, 496 F. 2d 235, 243 (6th Cir. 1974).

In the record here, Agent Meyer testifies that he removed the bag involved from the closet during the course of a search he was making incident to the arrest of the defendant prior to his giving of consent. He removed only the 9 mm gun, and then replaced the bag in the closet. He also indicates that he looked through the bag at this point:

MR. RINALDO:

Q. You went into the closet to retrieve a gun, is that correct?

MR. MEYER:

A. Yes.

Q. And the gun was in the white bag which is marked Government's Exhibit 13, this bag?

A. Yes.

Q. Do you recall if the bag was zipped up?

A. As I recall, it was already open.

Q. You reached in and retrieved the gun?

A. Yes.

Q. Did you leave the bag there on the floor?

A. I believe so, because I put the weapon on top of the bureau of drawers with the other weapon. I left the bag there.

Q. Did you search the bag to see if there was any other guns?

A. I could see there was no others.

Q. You left the bag in the closet?

A. Yes.

Q. On the floor?

A. Yes.

Q. You put the gun on the dresser?

A. Yes.

Q. Now --

A. After I unloaded it first, as I had done with the other, and placed them both on top of the bureau there.

Q. Then you got Mr. Gordon to sign a consent form and you went back into the closet?

A. Yes.

Q. Then you retrieved the bag?

A. Yes.

Q. You then took the bag out of the closet?

A. Yes.

Q. Did you look in the bag while it was in the closet?

A. Not on that occasion. I took it out of the closet.

(H.R. 79-80) (emphasis added)

The Court below suppressed the gun taken from the bag as seized during the course of an illegal search (Decision p. 6-7). However, the Court did not suppress the vinyl bag and items found therein (Decision p. 6-7).

It is submitted that the search of the bag had already been conduted. The defendant knew that the Agent would discover the various items here when he removed the gun from the bag. The defendant was consenting to nothing more than what had already taken place. He was waiving no constitutional right remaining to him at the time of signing the consent form. He had been effectively stripped of the right during the course of the prior search which the Court below ruled unreasonable. He could waive nothing; and accordingly, he could give no valid consent.

The custodial situation has of itself been held to be an almost per se indication of coerciveness. Cf. Judd v. U.S., 190 F. 2d 649 (DC Cir. 1951). This view has been somewhat tempered recently, but the fact that the person giving consent is in a custodial posture remains an important factor in the determination of the voluntariness of a consent. Cf. U.S. v. Watson, -- U.S. --, 96 S.Ct. 820, 828, -- L.Ed. 2d -- (1976).

The record in this case indicates a genuine coercive

atmosphere caused by the custodial restraints on the defendant. All within the space of a very few minutes, the defendant was knocked off balance by the two agents who surprised him at his door, spun around against a wall and frisked, handcuffed, made to reveal the whereabouts of his two pistols to one of the agents while the other physically held him, taken brusquely to his bed, set down, read his rights, and then requested to sign a form giving his consent to a search of his room (H.R. 65-75).

Agent Meyer, after he presented the defendant with the consent to search form, stated:

"MR. RINALDO: Then what occurred?

AGENT MEYER: I then explained to Mr. Gordon that it was our normal procedure to search the room, and I said, 'If you have no objection, we will search after you have read this permission to search.' I pulled another folded form out of my pocket, which we utilize, that has to do with explaining to him his right to refuse the search of the room. He said he would have no objection, and signed that form.

Q. Well, did he understand what he was signing?

A. He said he did. He said he understood."

(H.R. 75) (emphasis supplied)

During this entire time, the defendant was handcuffed with both of the F.B.I. agents next to him (H.R. 76-79).

Further, and prior to any discussion with Mr. Gordon about the consent to search form, the defendant indicated he wished to speak with an attorney.

Q. You asked him to sign the consent form after he indicated to you that he would not sign the waiver form unless he had an attorney, is that correct?

A. Right.

Q. After he signed the consent form then what did you do?

A. I searched the room in detail.

(H.R. 76-77)

It is submitted that the record shows conclusively that there was no exercise of free will by Mr. Gordon from the time of the agent's entry into his room until well after the consent form was signed. Furthermore, the action of the agents, and especially the language of the agents, in presenting their request for defendant's consent to a search, were presumptive of a positive response on the defendant's part. Despite their mention to him that he had the right to refuse to consent, he could not have felt that he really had a choice in view of their affirmative actions.

Consent is not voluntary when it is given in response to a claim or show of authority by the police that they have a right to search. Cf. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968), Amos v. U.S., 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921).

While the defendant does not claim that the agents here made a specific claim as to a right to search in order to elicit his consent, the language which they used was unambiguous as to their intention to search the room, and was tempered only by the formality of having the defendant read and sign the form.

AGENT MEYER: I then explained to Mr. Gordon it was our normal procedure to search the room, and I said, "If you have no objection, we will search after you have read this permission to search." I pulled another folded form out of my pocket, which we utilize, that has to do with explaining to him his right to refuse the search of the room. He said he would have no objection, and signed that form.

(H.R. 75)

Although the knowledge of the right to refuse consent is not the sine qua non of an effective consent, it is one factor to be taken into account. Schneckloth, supra, at 227.

It is very questionable from the record account of what took place in the defendant's room that he understood that he might refuse to consent. In contrast to the portion of the record just cited compare the following:

MR. WILLIAMS: Let me show you what is marked Government's Exhibit 14 for identification, do you recognize that?

AGENT MEYER: Yes, sir, this is the permission to search, signed by Mr. Gordon and myself.

Q: All right. Now, you testified that you read that to him?

A: Yes, I did.

Q: All right. After you read that to him what, if anything, did you say and what, if anything, did he say?

A: I told him it was our procedure in a case similar to that where we had arrested a suspect for bank robbery, we like to search in detail, and after I read the form to him he said he had no objection, that he had told me where all the guns were, the two weapons he had pointed out. He said they had been legally purchased, that he had committed no crimes with them, he had no objection to our searching the room, and he signed the form.

Q: You testified you read that form to him?

A: Yes.

Q: All right. Did you ever show him that?

A: Yes, I did, right after I read it.

Q: Do you know whether or not he read it?

A: He appeared to. He glanced at it before he signed it. I can only say I thought he did read it. At least he observed the form.

(H.R. 49-50) (emphasis added)

Although the defendant was informed that he could refuse, it is very doubtful that he understood that such a refusal was an actual possibility.

This case presents a very clear showing that by the "totality of the circumstances" here was no voluntary consent. The defendant was thrown into a custody situation very suddenly, forced to submit to every whim of his captors, shackled, held, forced to aid the agents in their first unconstitutional search of his room, continually questioned after expressing his desire to have counsel, and then told that it was the agents' "normal procedure" to search in "similar" cases.

To hold that the consent he thereupon gave to the agents to search his room was voluntary is clearly erroneous and demands a reversal by this Court. The atmosphere surrounding the defendant at the point he gave his consent

fairly reeked of coercion, both implied and expressed, and voluntariness is not even a possibility.

The Government did not show by "clear and convincing" evidence that the consent to search so obtained was, in fact, freely and voluntarily given by a person who was aware of his right not to consent.

Accordingly, it is respectfully requested that this Court order a new trial in this matter and grant the defendant's motion to suppress the items seized by the Government from the defendant's apartment closet on October 6, 1975.

POINT III

THE COURT'S EIGHTEEN YEAR SENTENCE WAS ARBITRARY AND CAPRICIOUS, ABUSIVE OF THE COURT'S DISCRETION, AND DENIED HERBERT DAVIS GORDON OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

Defendant was convicted of violating sections 2113 (a), (b), and (d) of Title 18 U.S.C., which sections carry maximum sentences, respectively, of 20, 10, and 25 years.

The defendant, on March 15, 1976, was sentenced by the Trial Court to serve a term of 18 (eighteen) years in prison.

Federal District Judges are, generally, allowed wide discretion in imposing sentences within the statutory limits. Fed. Rules Crim. Proc. 32 (a) (2) 18 U.S.A., U.S. v. Tucker 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed. 2d (1972); U.S. v. McCord 466 F.2d 17 (2nd Cir. 1972).

The Court of Appeals will not disturb a sentence unless there has been a gross abuse of discretion. U.S. v. Latimer 415 F.2d 1288 (6th Cir. 1969). However, it is not beyond the power of a Federal Appellate Court to vacate a sentence based upon clearly erroneous criteria. U.S. v. Mitchell, 392 F.2d

214 (2nd Cir. 1968) (Kaufman, Cir. J., concurring).

It is the contention of the defendant that the Trial Judge, in imposing sentence, could only have arrived at that sentence in disregard of many important facts, the disregard of which caused his criteria to be "clearly erroneous."[3]

The defendant is not a mastermind of criminal complot seeking to live continually in prey upon working society; an aberrant being who endeavors without surcease to feast upon the lawful and hard-earned gatherings of others. He is, rather, a man trying to break through the barrier in order to enter that working society, but one who chose, very simply, an unhappy means to accomplish that end. His unfortunate choice resulted from the existence of the very barrier he sought to overcome. It was the cause of the temporary distortion of the defendant's view of how to go about getting beyond it. To incarcerate the defendant for what will effectively be the remainder of his useful

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[3] In U.S. v. McCoy, 517 F.2d 47 (1975), the Seventh Circuit expressed their view that "it may be important that record demonstrate that the judge made an informed choice, that is to say, that he both understood the range of his discretion and considered relevant factors bearing on the individual situation bedore him." The Court here did not elaborate on its sentence beyond its mere statement.

life[4] -- the prime years, in fact -- hardly seems a proper mode of dealing with someone who was not avenging himself on society but rather trying to find a springboard from which he could find acceptance into it.

The F.B.I. Agent who arrested the defendant testified that the defendant told him "he had come to Dallas to make a new start ... and that he planned to look for a job and settle down in Dallas." (H.R. 59). He was seeking a new life, a new productive life. The defendant, frustrated in the degrading and oppressive quotidian existence into which destiny had locked him in Buffalo, was led to the misguided vision that were he to suddenly acquire sufficient material means to move out of his present condition, the rest would fall into place. This view, distorted by an ungracious social fate of which he was not the cause but only the subject, was the one bad foothold he took in attempting to climb the path to a better life. For having made this error of judgment, the defendant has been condemned to never be able to attempt again to reconcile himself with the rest of society. Rather than being accorded some form of

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4 The defendant is 45 years of age and is now facing a term of 18 years imprisonment. This means he will not be released until his sixty-third year. He will have left to him at that time an expected five years only of life without prison walls.

help that would lead him to his goal, the defendant has been condemned to a fate that merely continues the sterile existence which led him to commit his crime in the first place.

In the Appendix to this Brief are photocopies of certain letters (see Exhibit C) in the hand of the defendant which attest to his desire to reach up and climb out of the destiny that he had seen as escapable only through the sudden acquisition of sufficient material well-being to enable him to have the footing to enter the ground of productive society. That his vision was impaired is apparent from these letters, but not nearly so apparent as his real desire to seek self-betterment, mixed, as it is, with the confusion his frustration has caused him.

When he speaks in his correspondence of leaving the United States for an adoptive state elsewhere in the world, his meaning is clear, he wants to find acceptance in society. He wants and needs a chance to start afresh.

In Mitchell, supra, the Court invoked the opinion of the Supreme Court in Williams v. People of the State

of New York[5] that the "modern philosophy of penology is to have the punishment fit the individual rather than the crime." One is bound to ask the question begged, namely, whether the imposition of 18 years imprisonment is a punishment that fits properly to an individual who is reaching out to find a way to find acceptance into productive society and to accept it as his own and have it accept him.

Is this, viewed from any angle, a proper tailoring of judicially discreet sanction? It is submitted that it is not and that it will only serve to further injure a man beset with a disease that is very likely of the curable variety and not of the type that should see him confined to a leper colony.

There remains, however, other factors and while they are perhaps less telling than this first one, and they bear directly upon the point of the Court abusing its discretion in determining the sentence it served upon the defendant.

The amount of money which the defendant collected

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[5] 337 U.S. 241, 246, (1949).

from the bank was not, by any stretch of the imagination, a stupendous sum. It totaled something less than eight hundred dollars. This fact is pointed out to the Court as being important on the basis of the way in which the statute under which the defendant was convicted is drawn.

Section 2113 (b) proscribes a one hundred dollar breaking point between less and more serious bank theft. The statute contains a great variance in both the amount of monetary fines and prison sentences which may be imposed for a violation of a particular section.

One must impute to the Congress an intention to view the seriousness of the crime of bank robbery as having some direct correlation with the amount of money involved.

Since the amount taken from the bank here was not so far in excess of that which the statute holds forth as a limit, it is the contention of the appellant that the imposition of a sentence nearing the upper limits allowed by the statute constituted an abuse of discretion by the sentencing court.

Both this fact and the socio-psychological sources motivating the defendant in his anti-social action are closely related to another consideration which will help

bring them out to an even greater degree, the course of action followed by the defendant in going about the commission of his crime and thereafter until he was apprehended.

The defendant chose, first of all, a singularly inapposite time of day if his purpose were really to abscond with a great amount of funds from the bank. He entered the bank early in the business day, a time when little would have transpired and the teller would be in possession of little more than the amounts with which she would normally have on hand to handle the morning's slow transactional flow. Such a choice of time says much for the view of this crime being almost of the calibre of the "crime of passion," rather than some truly malicious criminal act.

Yet even the term "crime of passion" connotes far more than what actually happened here. Those crimes usually involve some act of extreme violence. Here, there was no violence.

When the defendant was told by the teller that his demand could not be met, he did not resort to further threats of force, or worse. He only told her to add the

coins she had at her station to the paper money she had already placed in the bag. That much accomplished, the defendant told the teller and the other bank employee present to get on the floor and then made his escape. His actions were not too fear-instilling to the teller that she was unable to attempt to grab the hold-up note off the counter directly in front of the defendant (R. 5-7).

The next moves by the defendant are most ironic and indicative of the sincerity of his claim that he was off to make a fresh start. The defendant returned to the rooming house in which he had been living and used the first of the money he had taken from the bank to settle with his landlord (R. 22). To his own mind he was taking the first step in his new life, and he could believe so, for he now had the material wherewithal to allow him to achieve his goal.

He chose next the rather unglorious but frugal means of reaching the place where his new life would begin. The defendant rode the train to Dallas. Once there he took a room at the YMCA. His choice of life-style reflects less a big-time bank-robber than a man seeking to stretch as far as possible the means in hand when he knows that he must use them carefully if he is to accomplish all that he wants.

Finally, as has been pointed out in the preceding

arguments, the defendant's comportment at the time of arrest denoted an extreme case of resignation. He offered no resistance whatsoever, and his actions bespeak not only the fatalistic realization that must have been his at the moment, but a contrite and perhaps not unwanted recall to the reality that his choice of means for effecting his planned new life was a wrong one. His facilely obtained self-incriminatory statements to the agents when he was shown the facsimile of the photo taken by the bank surveillance camera connotes a will to be free of the guilt his wrong caused him.

In light of all these facts, it is the respectful submission of the appellant that the sentence of 18 years imprisonment imposed by the Trial Court could not have been made with any deference to the requirement that it be made to "fit the individual" that is the defendant, and that it looked only to the crime, and that, this being so, it was an arbitrary abuse of discretion by the sentencing court which violated the due process and equal protection rights of the defendant.

CONCLUSION

The Court is respectfully requested to reverse the judgment of conviction and order a new trial for this defendant or, in the alternative, modify the defendant's harsh sentence and to grant such other and further relief as to the Court appears to be just and proper under all of the circumstances of this case.

Respectfully submitted,

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UNITED STATES OF AMERICA

vs.

HERBERT DAVIS GORDON

APPEAL - No. 76-1138

AFFIDAVIT OF SERVICE

I, THOMAS N. RINALDO, on May 11, 1976 served two copies of the Brief and Appendix on Appeal in this matter personally on ROGER WILLIAMS, ESQ., Assistant District Attorney, for the Western District of New York and he acknowledged receipt of same in my presence.

Thomas N. Rinaldo

Sworn to before me this
11th day of May, 1976

Denise A. Scenta
Notary Public : Erie County
My Commission Expires: 3/30/77